Supreme Court of the United States

OCTOBER TERM

In the Matter of:

Docket No. 43

WILLIAM J. McCARTHY,

Petitioner;

vs.

UNITED STATES OF AMERICA,

Respondent.

Place Washington, D. C.

Date December 9, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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WILLIAM J. McCARTHY, Petitioner;	:	
vs.	:	No. 43
UNITED STATES OF AMERICA, Respondent.	:	

Washington, D. C.

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The above-entitled matter came on for argument at 10:20 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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Counsel for Petitioner

JAMES VAN R. SPRINGER
United STates Department of Justice
Washington, D. C.
Counsel for Respondent

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P R O C E E D I N G S

CHIEF JUSTICE WARREN: The first case on the calendar is No. 43, William J. McCarthy, petitioner, versus the United States.

Mr. McCarthy?

ORAL ARGUMENT OF MAURICE J. McCARTHY, ESQ.

ON BEHALF OF THE PETITIONER

MR. McCARTHY: Maurice J. McCarthy, appearing on behalf of the petitioner, William J. McCarthy.

I am sure the question has occurred to the Court, so I will clear it up initially. The petitioner and I are not related. The fact that we have the same last names is purely coincidence.

The facts in the case are not complicated:

On April 1, 1966, a three-count indictment was returned against the petitioner, charging income tax evasion under section 7201 of the Internal Revenue Code, and alleging that there were deficiencies in taxes of approximately $900 for the year of 1959, $5,000 for the year 1960, and $1,200 for the year 1961.

On April 14, 1966, the petitioner appeared in the District Court with retained counsel and at that time counsel waived the reading of the indictment and entered a plea of not guilty to each of the three counts. The Court set the trial for the 15th of June 1966.

Thereafter -- which the record does not disclose -- the trial was reset for June 30, 1966. On June 29, 1966, Government counsel, appearing ex parte, informed the Court that the petitioner's illness made it impossible to try the case and asked for a continuance. The District Judge reset the case to the 15th of July.

On the 15th of July, the petitioner, again appearing with retained counsel, appeared for the trial of the case. At that time, counsel for the petitioner informed the Court that he would like to withdraw the plea of not guilty to Count 2 of the indictment and to offer a plea of guilty to that count, which was the allegation of approximately $500 in unpaid taxes for the year 1960.

The Court interrogated counsel for the Government, who indicated that upon acceptance of the plea of guilty, Government counsel would move to dismiss Counts 1 and 3. The District Judge at that time questioned the defendant personally as to two matters.

First of all, he asked the defendant, on the trial level, if he was aware that by pleading guilty he waived his right to a jury trial. The defendant responded in the affirmative.

He then asked concerning the statutory penalties of five years imprisonment and a maximum five-year imprisonment and a maximum $10,000 fine.

Upon receiving affirmative responses, the District Judge entered a finding of guilty. At this point, Government counsel asked the District Judge to inquire of the defendant whether any threats or promises had been made. The District Judge did inquire, and received negative responses; that no threats had been made and no promises had been given.

No further questioning was had either of the defendant or of retained counsel, and the case was set for a sentencing hearing in September 1966, on September 14th.

At that time, the petitioner again appeared with retained counsel, and the District Judge, in the allocution procedure, asked the defendant personally if he had anything to say. The defendant's response was that if it were not for his health and the things that he had gone through, it never would have happened, and that it was not deliberate. No further questions were asked of the defendant.

The petitioner's counsel at that time was present and the District Court directed its attention to him. He was asked if he had a statement and he made a brief statement. The Court then indicated that in view of the size of the amount involved, that the deterrent effect of a sentence was necessary and entered a sentence of one year imprisonment and a fine of $2,500.

Counsel for the petitioner on the District Court level then asked to be heard. He addressed the District Judge

and informed the District Judge of the facts concerning the character of the defendant himself. He indicated to the Court that the defendant was at the time of the proceedings 65 years old; that he had never been familiar with any Federal offense of any sort; that he had a fine family.

He further informed the Court that the defendant had just recently, approximately two months prior to the sentencing hearing, which was at approximately the same time as the tender of the plea of guilty, that the petitioner had become a member of Alcoholics Anonymous because he had been an acute alcoholic for some time.

He further informed the Court that at the time that the crime was allegedly committed, that being the time of the filing of the income tax return, that the petitioner had been involved in what counsel called a protracted drinking situation from which he was hospitalized. No questions concerning this matter were asked of the counsel for the defendant in the District Court.

Counsel then spoke of the nature of the crime and of the evidence that was present or apparently present on the District Court level. His exposition of the crime consisted in saying that the books of the defendant had been negligently kept and that this negligence, when it became gross, amounted to criminal intent. There was no questioning concerning the exposition of the crime.

The Probation Officer then informed the Court that the Alcoholics Anonymous sponsor of the defendant was present in open court and available to testify concerning those matters. The District Court did not take any testimony or confer with the sponsor from Alcoholics Anonymous.

The District Court then refused to vacate or suspend sentence and entered a stay of execution for approximately 15 days.

The argument of the petitioner presents three questions.

The first of these questions concerns Federal Rule 11 of the Rules of Criminal Procedure, which was amended effective July 1, 1966. Since this plea was tendered on July 15, 1966, it is governed by the rule as amended. That amendment, and the notes of the Advisory Committee to this Court concerning the addition of the wording in the rule which constitutes the amendment, is critical in this case.

The amendment required that the District Court address the defendant personally, rather than what had been the practice in the past of allowing the Court to address counsel for the defendant. In this case, there was no questioning of the petitioner other than on the matters which I have stated in the exposition of the facts.

Our contention is that amended Rule 11 directs and demands that the District Judge inquire personally of the

defendant as to his understanding of the nature of the charge. This was never done. We, therefore, contend that at the time of the acceptance of the plea of guilty on July 15, 1966, error was committed. We contend that this error was compounded at the sentencing hearing which occurred in September 1966 in that certain facts were brought to the attention of the District Court which required inquiry.

We have cited in our brief to this Court the universal opinion of the lower courts, the Circuit Courts, that Rule 11 imposes on the District Judge a duty of inquiry. We feel that in view of the facts presented to the District Judge, this duty of inquiry was very right and yet no inquiry was had of the defendant personally or even of his counsel for that matter, or the other persons who were available to give information.

Q What is the provision in Rule 11 upon which you rely for that last argument?

A There is no provision in Rule 11 concerning the duty of inquiry. But the provision in Rule 11 is that the District Judge must address the defendant personally and determine. I draw from this the conclusion --

Q And determine that the plea is made voluntarily?

A Voluntarily, with an understanding of the nature of the charge and the consequences of the plea. I draw from this the conclusion, and I support it with case law in our briefs, that there is a duty of inquiry on the District Judge

both at the time that the plea is accepted and later when sentence is rendered against the defendant to inquiry in the event that any fact is presented to the Judge concerning the nature of the crime or the character of the defendant.

In this case, there was no questionining whatever, not one question of the petitioner himself as to what he understood to be the nature of the accusation, nor of the petitioner's counsel. Both of these persons were present and available to testify and much of the confusion in the record could have been cleared up had the District Judge addressed questions to them.

Q I hope this will not disturb the order of your argument, but I would like to call your attention to the last sentence of Rule 11, as amended. I take it from reading your brief that although you refer to that last sentence, you don't really rely on it. You recall that the last sentence says that the Court shall not enter a judgment upon the plea of guilty unless it is satisfied that there is a factual basis for the plea.

What was the date of the entry of judgment upon the plea?

A Judgment was entered on September 14, 1966.

Q And at that time, I think the record shows that the Judge had before him, and had consulted, the presentence report.

A Yes, he did, Your Honor.

Q And at that time, do I correctly recall that he referred to the certain bookkeeping difficulties revealed by the presentence report?

A Yes, he did.

Q Do you argue that there was no explicit finding, however, by the Court in September that it was satisfied that there was a factual basis for the plea? Was there such a find-int?

A No, there was no such finding.

Q You do not argue that the Court has to make such an explicit finding, do you? I don't read that in your brief.

A I don't argue that there must be an explicit finding; no.

Q Why not?

A The wording of the rule, itself, does not require an explicit finding.

Q You read "unless it is satisfied" as referring to a mental state which the Judge does not have to make explicit?

A Well, one thing I see in there as explicit is that the Judge must make a determination that the plea is made voluntarily with an understanding of the nature of the charge and the consequences of the plea.

Q That is the first part of it.

A The latter part of the rule I read to require

the Judge to be satisfied in the circumstances that a factual basis exists for the plea. It does not say for the charge. It does not say of the acts which constitute the charge, that he is satisfied that those acts occurred.

Q What do you think that last sentence means? How can he be satisfied that the plea is justified without having some basis for believing that the defendant did the act?

A I think this is the argument which we made, Your Honor, in our brief, that there are two elements to the crime, since this is a specific intent crime. There are the acts and there is the intent.

Q But you don't tie them, as I remember -- and perhaps I am wrong -- you don't tie that argument into this last sentence, do you?

A Perhaps not as artistically as I should have.

Q I don't say that critically. I am trying to find out your theory. After all, I believe I am correct in saying that this is the first time that the amendments of Rule 11 have been before us.

A As far as I understand it, that is correct.

Q I confess a little surprise at the sort of lack of reliance on that last sentence. But I take it now, from what you have said, that you regard it as referring only to a mental state of the Court which did not have to be reflected in any finding or any statement by the Court.

Suppose at the time of the entry of judgment, the Court had before it a presentence report which did not, however, make any reference whatever to the particular crime. I suppose that is possible. I have seen presentence reports like that. There is nothing before the Court whatever except the indictment, the plea of guilty, and a presentence investigation report that makes no reference to the particular crime of either the defendant or his counsel.

In your opinion, would that satisfy the last sentence?

A No, I don't think it would, Your Honor.

Q I miss in your brief any discussion of questions as to whether this last sentence was or was not satisfied in your case.

A My argument is this: that error occurred at the time of acceptance of the plea. Had that error not occurred, there would have been no presentence report. I, therefore, do not consider the presentence report as controlling in any way. I feel thereafter that the matters occurring in open court and the information supplied to the District Judge in open court served to compound the error by indicating to the District Judge that there was no factual basis for the plea.

Q I am afraid that is the way I read your brief. So it means if we don't agree with you about the first part of Rule 11, that you are out of court, so far as your argument is concerned.

If we don't agree with you about the application of the phrase in Rule 11 "in this case," that is, that the Court must first address the defendant personally and determine that the plea is made voluntarily, et cetera, if we don't agree with you about that, then your argument falls, because you treat the last sentence as a mere appendage.

You get some support to that, I agree, from the reporter's note, the advisory note. Am I correct about your argument?

A I have not argued that that last part of the rule is mandatory because of the language of the rule itself. It says the District Court must be satisfied. This is a word which leaves some room for argument.

My position, and the position of the petitioner, is that in view of the matters occurring in open court, any decision which the District Court came to was not founded upon a reasonable basis; that the Court was informed of matters which required further inquiry; was informed of the age and inexperience with criminal matters of the defendant; was informed of his past alcoholic condition both at the time that the plea was tendered and at the time that the crime was alleged to have been committed; and was informed that counsel for the petitioner had made an exposition of the crime which was incorrect.

Counsel had said that negligence could constitute the crime. The last decision of this Court on defining tax evasion,

the Sansone case, cited in our brief, indicates that willfulness is the characteristic element, that specific intent is the characteristic element of the crime. When an inconsistent statement occurs, certainly there is a duty of inquiry. The statement of the defendant himself, at the trial level, was inconsistent.

Q Why do you think the committee put that sentence in the rules?

A Concerning the factual basis of the plea? Well, as the notes of the committee indicate, the reason for that particular sentence was to insure that a defendant who may have understood the charge was certain that the acts which he admitted constituted the crime. I think the reverse of that is also true, that an individual who admitted the acts necessary to --

Q But it says that the Judge is satisfied. The last sentence says the Judge must be satisfied. Doesn't it appear just from the language of that sentence that the idea was to see that the Court, before sentencing a man, is satisfied that he wasn't pleading guilty because of desperation or whatever it may be, wanting to put an end to an uncertain situation or whatever, or pressure or whatnot? The Judge has to be satisfied that there is a factual basis for the plea.

A This is the second part of our argument, Your Honor, that there is an abuse of discretion in this case.

Q I understand your brief on pages 24 to 29, about five or six full, printed pages, has the thrust of your argument, almost precisely, to be what Mr. Justice Fortas' questions suggested; that is, that there was not compliance in this case with the final sentence in newly amended Rule 11. Is that right?

A Exactly, Your Honor. But I frame it in terms of an abuse of discretion on the part of the District Court because I don't find that language to be sufficiently specific. The language is that the Court must be satisfied. That is why I couch the argument in terms of discretion and an abuse thereafter.

The counsel for the respondent argues that the rule leaves some discretion in the District Court, although he would apply it also to the first part of Rule 11 concerning the taking and accepting of a plea of guilty. However, the respondent does not address himself to the facts in this case which we argue required inquiry by the District Judge.

Our third argument --

Q Mr. McCarthy, do you put any responsibility on the retained counsel, and I do mean "any"?

A Of course there is responsibility on retained counsel, Your Honor.

Q Is your position that the fact that they didn't call the Alcoholics Anonymous man is enough?

A No.

Q What should the Court do? Go out and subpoena witnesses?

A The Court is required under Rule 11 to address the defendant personally and to determine that he, the defendant, understands the nature of the charge and the consequences of the plea.

Q Don't you think the Judge was right in taking into consideration that this man might have been fit for Alcoholics Anonymous but that wasn't sufficient?

A I am quite sure that being a member of --

Q There is the lawyer's statement that this man was a fit candidate for Alcoholics Anonymous. What else did the Judge have?

A The Judge had the age of the defendant. The defendant was 65 years of age.

Q That is discretionary, isn't it?

A Yes.

Q That is, if he wants to put a 65-year-old man in jail. That is discretionary. What else did the Court have?

A The question isn't whether or not to put a 65-year-old man in jail. The question is whether or not a 65-year-old man sufficiently understands the nature of the charge. This is the question, whether he has been informed and understands the meaning of the accusation.

Q Would your argument be the same if he was 45?

A I think a man more in the prime of his life would be less likely to be confused about these matters. This is perhaps in the discretion of the Court, but this is precisely my argument: that the discretion of the Court was not properly exercised.

Q Why?

A Some men of advanced years have extreme acumen; some do not.

Q What should the Judge do at that stage? Put him on the stand?

A Rule 32 requires at the sentencing hearing that the District Judge address the defendant personally. This, again, imposes --

Q He did in the original hearing.

A He did inquire of the defendant at the sentencing hearing and the defendant said the following:

"If it were not for my health and the things I have gone through, it wouldn't have happened and it is not deliberate."

A statement such as "it is not deliberate" is a point blank denial of the characteristic element of the crime under 7201.

Q What should the Court have done, then?

A The Court should have inquired as to what he meant by "it is not deliberate."

Q Suppose he had done that? Would it be all right? Would it have been enough?

A It would have been what the military calls "provi-dence" on the record.

Q The military?

A I cited to this Court cases from the Court of Military Appeals. I just use the phraseology which they have used. What I mean is that there would have been in the record evidence to have established that in open court the defendant had been informed of the charge and had knowingly pleaded to that charge.

Q Couldn't the defendant, with or without the advice of his retained counsel, have volunteered what was good for him, or do you think the Court is obliged to inquire into all of the materials?

I come back to my original question. Don't you think retained counsel has some responsibility?

A Yes, sir; of course retained counsel does.

My last argument is on the constitutional question involved here. I think it is pointed up well by the alternatives suggested by counsel for the respondent. Counsel for the respondent says that this is the first case which has come up on a direct appeal from the acceptance of a plea of guilty which was not preceded by a motion to vacate or by a motion to withdraw.

I note in my reply brief that the authority cited by the respondent for this position, that the accepted and usual methods are a motion to withdraw or a motion to vacate, leave the defendant below with unconstitutional alternatives.

If he moves to withdraw the plea, he must accept the burden of proving innocence. If he does that, it seems to me that the Fifth Amendment guarantee of due process and the presumption of innocence are reversed.

If he should move to vacate the sentence, that motion, under 2255, can only be made when the defendant is in custody.

So the alternatives left open to the defendant in a situation such as this are to either go into custody land move to vacate, or accept a burden of proving innocence. We feel that this constitutional question has not been answered by the respondent. We, therefore, respectfully submit that the judgment should be reversed and the cause remanded for trial.

CHIEF JUSTICE WARREN: Mr. Springer?

ORAL ARGUMENT OF JAMES VAN R. SPRINGER, ESQ.

ON BEHALF OF THE RESPONDENT

MR. SPRINGER: Mr. Chief Justice, may it please the Court: The Court is handicapped in this case, we feel, because this is here on direct appeal, as the petitioner points up, altnough he, as I understand it, still makes two claims: One, that there was not sufficient objective factual basis for the

entry of a judgment on his plea; and two, that before accepting the plea, the Trial Judge did not make an adequate determination as to his subjective understanding of the nature of the charges.

Although the petitioner's case is based on these two contentions, we, in fact, have no testimony by the defendant as to whether or not he did understand the charges and not even a factual allegation that he did not understand the charges. Also, we have little, if any, direct evidence relating to the charges themselves upon which we could determine whether or not there was, in fact, an objective basis.

However, the record does indicate a number of the circumstances surrounding this plea and the entry of judgment upon it, and we feel it is important to bear some of these in mind.

First of all, the nature of the charge itself. The indictment which related to tax deficiencies in the one year of 1960 is simple and straightforward. It charged that the defendant willfully and knowingly attempted to evade his taxes for that year by willfully and knowingly filing a tax return understating his income by some $13,000, which was somewhat more than 40 percent of the total alleged income for that year.

Q Is that what he was convicted of -- $15,000?

A Yes. Of course, there was no specific finding. He pleaded guilty to a deficiency of approximately $13,000.

Q I thought he pleaded guilty to only one of the three counts and the other two were dismissed?

A Yes. I am sorry. In that one year of 1960 there was an alleged deficiency of $13,000. There were somewhat smaller deficiencies alleged in the years 1959 to 1961. Those counts were dismissed.

I might point out, however, they were dismissed upon an understanding expressed by Government counsel, to which petitioner's counsel agreed, that the taxes for all three years would be paid. From this, I think it is fair to infer that there was never any dispute as to the actual existence of a tax deficiency.

Accordingly, the only fact issue in the case was the issue of the defendant's intent, whet her he willfully filed a false tax return. So there was, we submit, no possibility of any confusion as to lesser included offenses or anything. There was a simple factual question of willfulness.

Q Had it not been willful, if it had been neglect, it would have been an included offense, would it not?

A Mr. Chief Justice, I believe this Court held in Sansome that all of the criminal tax provisions coalesce, as it were, in the case where the charge is the filing of a return that falsely stated income.

Q If the defendant had misunderstood that word "willful" and it had been a matter of neglect so far as he was

concerned, it would have been a minor offense, wouldn't it?

A In fact, I believe there would have been no offense at all. None of the criminal provisions would have applied. Each of the three require willfulness.

Q Let's put it this way: Are there any included offenses in a charge of this kind?

A No. In fact, that is, I believe, what this Court held in the Sansone case. There are none as to which instructions are required to be given. It is either all or nothing.

Q The District Attorney does have the right to charge it either as a misdemeanor or as a felony, does he not?

A Yes, he does. But when the charge is made, it is a single question and there is the one question of willfulness.

Before he pleaded, the defendant had, as the record shows, retained counsel for a period of at least three months. There was an indication some two weeks before he finally pleaded guilty that petitioner's counsel had led Government counsel to believe that there would not be a trial of the case. From this, we think it is reasonable to infer that there were substantial discussions about the charges between the defendant and his counsel, and we find it hard to believe that those discussions would not have explored fully the single fact issue in the case.

Q Apart from what the merits may be, I suppose the Government's position is that the petitioner, having pleaded guilty, it was his responsibility, upon being personally addressed by the Court, to come forward with some sort of showing that would indicate, that would give a basis, for a claim at that time or subsequently, if that can be done, that he did not plead guilty knowingly. Is that right?

A Yes. In fact, it is our position that if, in fact, the defendant now has available to him some factual indication that the plea was not knowing, or, for that matter, that there was not an adequate factual basis for the plea, he can riase this collaterally.

Q The only question is whether there would have to be a showing made at the time, some showing made at the time that the prisoner is addressed by the Judge. If so, what form that has to take. Is it or is it not the Government's position, whether it is raised collaterally or on direct appeal, that that is the time when a showing has to be made under Rule 11?

A No, we would not stand on the proposition that that is the only time it can be made.

Q You say it can be made collaterally?

A Yes. In fact, we would submit that there is no substance to the petitioner's contentions that he is in any way barred from raising this matter either under Rule 32b or under Rule 2255.

Q What you are saying to us, then, comes down to the proposition, as I understand it, that there is no evidence, or nothing upon which we can rely, in this record to show that the plea was not voluntarily and knowingly made. Is that right?

A Yes.

Q And also that nothing is before us to show that the necessary element of the crime, that is to say, the knowing evasion of taxes, was not present.

A Yes. In fact, as to the first point, we would submit that there is enough in this record to show that there was ample basis for the inference which the Trial Judge evidently made that the defendant understood the nature of the charges when he pleaded.

Q To comply with Rule 11, wouldn't you think the Judge himself must, as you just suggested, at least go through the processes in his own mind, by determining, as Rule 11 requires, that the defendand understood the consequences of his plea and the nature of the charge?

A Yes, Mr. Justice. We do not believe, however, that there is anything in the rule that requires a specific, identifiable finding in the record.

Q I know, but it is not enough for you to win you case just to say that there is no evidence in the record to indicate that he didn't do it.

A No. We are prepared to argue that the contrary

is true; that there is enough evidence in the record to support such an inference.

Q Don't you have to?

A Yes, we certainly do.

Q And you are willing to decide this case on the basis of Rule 11?

A On the basis of the compliance by the Court with the real substance of Rule 11, which we feel is that a determination, at least within the Judge's own mind, be made, and that there be an adequate basis for that determination. We concede, of course, that it would have been better if the Judge had specifically addressed the defendant as to his understanding of the charges.

Q As part of being the factual basis for the charge and the plea, I gather that the only issue in the case was knowing. Didn't the Judge himself, at the time of sentencing, make his own finding as to that?

A In effect, he did that.

Q He said, "In my opinion, the matter in which the books were kept is not inadvertent." That is pretty close, isn't it?

A I would think so. That plus some of the related discussions, plus, in fact, what defendant's counsel said at the sentencing indicate that the Judge was very familiar with the presentencing report.

Q But this is a different matter from satisfying himself that the defendant himself understood the nature of the charge and knew what he was pleading guilty to.

A Yes. This is really the objective question and the other is the subjective question as to voluntariness and so forth.

Q As I understand, you say that there is enough in the record to support an inference by us that the Court did satisfy this rule. Did you go farther and do you say that there was a clear compliance with Rule 11 by the Judge?

A Mr. Chief Justice, I would suggest that that perhaps becomes a semantic question.

Q No, it isn't semantic at all. It is one thing to say that there is ehough in the record for us to infer that perhaps he did know enough about the case to properly sentence him, and it is another thing to answer whether he actually followed Rule 11 or not, which is the question before us.

A I have to say that Rule 11 did direct him to address the defendant and he did not do that.

Q Do you think it is too much for this Court to insist that Rule 11 be followed by a District Judge before he sends a man away to prison for a term of years, when the defendant has pled guilty, he saved the State a trial, he is before him there for anything the Judge wants to do, up to the maximum punishment that the statute allows?

Do you think it is too much for a Judge to clearly and distinctly and accurately follow Rule 11?

A Certainly not, Mr. Chief Justice.

Q Then why do you support this?

A I think that the fact that the Judge did not fully comply with Rule 11 is not dispositive of this case.

Q You think, then, that we ought to give the benefit of the doubt to the Judge, rather than to the defendant?

A First, we would say that there was, in effect, a determination.

Q You qualify everything you say. You say "in effect." You answered me a moment ago that he did not follow the rule.

A As I say, Mr. Chief Justice, we have to concede that. However, the fundamental question here, at least on the subjective issue, is whether, in fact, the defendant did understand the charge. If there is a question on this record as to whether or not he did, we submit that it would not be prejudicial to the defendant to have a hearing on that issue.

Q His counsel told the Court that this man, because of his drinking, was negligent in doing these things and it was negligence that brought this around, rather than deliberation. That didn't prompt the Court to go any farther at all.

A Those, I believe, are counsel's inferences from the record, which I believe --

Q You are getting back to inferences again. He said that to the Court. It isn't an inference. He said it to the Court.

A If the reference is to the statements by the defendant's counsel at the sentencing hearing, Mr. Chief Justice, I would suggest that reading those statements as a whole does not, to my mind at least, disclose any inconsistencies with either the existence of a factual basis for the charges or the defendant's understanding.

Q Now I think we are getting into semantics when you refer to it that way. It is a violation, but reading it, the effect of it is that it didn't injure the defendant at all. That is semantics.

A If it be so, I have to concede that our case does, to that extent, depend upon that. We do insist, however, that the Government should be allowed at least to meet the burden, which we are prepared to accept, of proving on a hearing that the defendant did plead with an understanding of the charges against him.

Q Does the appendix at page 20, page 21 and page 22 correctly set out the conversation that took place between the Judge and the prisoner?

A Yes, Mr. Justice. That, in fact, is a quotation by the Court of Appeals from the plea record, which is set forth completely at pages 6 through 8.

Q That is what happened?

Did I understand you to say a while ago that the Judge did not directly address the defendant?

Did I understand you to say he did not directly address the defendant?

A No, Mr. Justice. He did, of course, directly address him and question him at some length on other conversations.

Q They had had some conversation, I understand.

A The subject on which he did not directly address the defendant, which is raised here, is the question of the defendant's understanding of the charges.

Q But he asked him about several things, whether he understood them, didn't he?

A Yes. He asked him whether he understood that he would be depriving himself of a jury trial by pleading guilty; whether he understood that he would be subjecting himself to a long sentence; whether he was pleading voluntarily; whether any promises had been made to him; or whether any threats had been made to induce the plea.

We do have to concede, though, there was the one further question which the Judge preferably would have asked, or perhaps a series of questions.

Q How would he have asked that, under the rule, in your judgment?

A I think it would not be enough simply to say "Do you understand the charge?"

Q What, in your judgment, did he fail to ask that he should have asked?

A I think in this case, because of the simplicity of the case, because of the simplicity of the charge, it could have been a simple question.

Q What is it you say that he didn't ask that the rule required him to ask?

A He did not ask "Do you understand that in order to be convicted of this charge you must have willfully filed a false tax return when stating your income?"

On the subjective question, that is the single issue in this case, whether or not the defendant did understand that requirement. As I have said, we believe that the record does indicate, first, that the Judg e so determined, and second, that he had a basis for doing so.

Q Does the rule say that he should ask him if he willfully committed a crime?

A Mr. Justice, the rule does say that he shall personally address the defendant and determine that the plea is made voluntarily and with an understanding of the nature of the charge.

Q And he did answer that voluntarily, didn't he?

A Yes. He did not, however, ask him if it was made

with an understanding of the nature of the charges.

Q He asked for three or four understandings, but he didn't sweep in the whole thing, you say.

A Yes.

Q That may be right. I am just asking you.

A We have to concede that that is something that the rule directed him to do that he did not do. However, we do submit it was harmless.

Q I am not drawing issue with you. I wanted to see exactly what it was.

A As to the basis for the inference, which we feel the District Judge properly drew, characterize it as you will, the defendant was a mature man, a businessman. He had had counsel for some months.

Q What was his business?

A It appears that he was some kind of printing jobber. At the end of the sentencing proceeding is a reference to a request for a stay of execution of the sentence because he was handling the printing of some ballots for the county at the time. That is the only indication in the record.

Q You say he could raise this collaterally in one or two ways.

A On direct appeal?

Q Why should you contest it, if you say it could be raised? Suppose we decide against you? I understand you to

say he could raise it collaterally.

A Yes.

Q So what you want is to show what happened.

A The problem here is when a defendant has pleaded guilty, the system is set up in such a way that he should not, at will, be able to withdraw his plea after he determines what his sentence will be.

Q But if it is shown that there was a mistake and the Judge left something out, why shouldn't he have a right to trial, as though he had never made this false step on a plea of guilty?

A I would simply urge the obverse of that; that having pleaded guilty, he should not have the option of undoing what we believe the record shows was a thoroughly considered, intelligent act on his part.

Q The Courts have been very liberal, haven't they, and have been admonished to be liberal, in connection with letting people withdraw their pleas of guilty when they have pleaded guilty and they come up and make what seems to be a bona fide claim that it was not right?

A Rule 32 relating to that does draw a distinction between the withdrawal of a plea before sentencing which can be done quite easily, and with the withdrawal of a plea after sentencing which can only be done after a showing of manifest injustice.

Q The Court would not want to keep a man imprisoned if he were not guilty.

A Of course not, and we would urge that if this record is not sufficient to support the acceptance of a plea and the entry of judgment upon it, that those facts should be explored in a hearing so that we will know whether or not there is a factual basis.

Q Is it a matter of a remand?

A We would suggest that it would be more orderly if it were done collaterally. Alternatively, we would suggest at the very least this case should be disposed of by a remand for a hearing rather than by a vacation of the judgment with the option then in the defendant to plead again.

Q As I understand, you concede that they raise the question in connection with the Judge which, if correct, he wouldn't have been justified in pleading guilty.

A It is raised only on appeal, however. It was never raised before.

Q I thought the lawyer raised it, saying he had been drinking and that he didn't know. Was that right?

A No, I think the discussion to which the references have been made were discussions in elaboration of the defendant's statement in allocation. The lawyer was not arguing that the plea was improper.

Q What did he say about it?

A About the plea?

Q About the defendant's knowledge.

A He said nothing directly about the defendant's knowledge.

Q What did he say from which something could be inferred about his drinking?

A It is a rather elaborate statement.

Q Just that part of it.

A It appears in a number of places in trial counsel's statement seeking to mitigate the sentence. It refers to problems that relate to drinking in this case.

"This man has experienced the kind of punishment, self-inflicted, which is almost a categorical listing of how he pleads." It is a somewhat disjointed statement.

Q Was it meant to leave the impression with the Judge that the man had been drinking to such an extent that he could not have willfully committed the crime?

A I think not, speaking very honestly, after a reading of the entire record. In fact, counsel's principal point was that the concealments and devious acts which resulted in this tax evasion were carried out for the purpose of secreting funds, as I interpret it, so that the defendant could purchase liquor and so forth without his family knowing about it. That was the thrust of counsel's argument, rather than any, what I consider to be, suggestion that, in fact, the defendant

was not responsible.

Q Didn't counsel say specifically to the Court that the failure to report this was a matter of negligence on the part of the defendant and not intentional, but he realized that in some circumstances negligence could be equated to that?

A The word he used, Mr. Chief Justice, in fact, was "neglect".

Q Neglect; yes.

A I would suggest that what he seems to me to have been meaning by "neglect" was the failure to do something, the failure to report income accurately. However, this man was an experienced lawyer. The Court of Appeals pointed out he was a former Assistant United States Attorney.

Q You mean the counsel was.

A Yes. I would suggest that the record does not support an inference that counsel was confused as to the nature of the charges. I think it is important to bear in mind what counsel's purpose in making these statements was. This was at a sentencing hearing.

Q I will tell you frankly what concerns me in this case. Here we have Rule 11 that is designed by this Court and by the Congress to eliminate the possibility of an innocent man pleading guilty and being sentenced to the penitentiary because he doesn't know what he is pleading guilty to.

You say to us that that remedial statute has not been

followed by the Court in this case. Yet you ask us, by reason of the totality of the circumstances, to excuse the Judge from having done this simple act, and ask us to keep the man in the penitentiary where a trial of this simple case could have cleared the matter up entirely.

Are we going to be subjected to that kind of case coming in here time after time, and this be a precedent for saying, "Well, the Judge doesn't have to follow section 11 in its entirety, if we can judge from the totality of the facts that the defendant probably knew what he was doing, then the defendant must stay in the penitentiary."

Really, this case to me has more significance than just this defendant. It is a question of whether we are going to have to say to the District Judges that they need not follow specifically Rule 11, which is of no great burden to them but which is a great b rden to the defendant when it comes to determining the nu ber of years he is going to spend in a penitentiary.

A Mr. C ief Justice, I would only say that in this case, because of the failure to make that simple inquiry at the plea proceeding, the Government has imposed upon it what may be a very substantial burden of going through a collateral proceeding, having to prove that, in fact, there was an understanding of the nature of the charges.

Q Mr. Springer, that surprises me. Could I ask you

to bear with me and let me see if I can get this straight in my own mind?

There are two phases here, chronologically, under Rule 11. One, a man pleads guilty in this case. Then, under Rule 11, before the Judge at that time, which in this case was July 15, 1966, at that time the Judge may not accept the plea of guilty without first addressing the defendant, without determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.

Are you with me?

A Yes.

Q On July 15, the Judge did address this defendant directly; right?

A Yes.

Q He did ask him about his understanding of the consequences of the plea; right?

A Yes.

Q Those were the words added, strangely enough, by the amendment effective July 1, 1966. You have stated to us, however, that he did not address the defendant directly with respect to the defendant's understanding of the nature of the charge, insofar as the Judge did not ask the defendant whether he understood that the income tax evasion had to be done knowingly in order to constitute the offense charged.

Am I right?

A Yes.

Q You agree with what I have said thus far?

A He did fail to inquire about that.

Q And you assert that that question can be attacked on a collateral basis?

A Yes, we do.

Q Is there any authority to that effect?

Remember, we are not talking about whether the prisoner can collaterally attack his conviction because he did not commit the crime knowingly. We are talking only about whether the prisoner can collaterally attack conviction because the Judge did not determine, by direct questioning, whether the prisoner understood the nature of the charge.

Is there any authority to the effect that that question, that narrow question of what happens after a plea of guilty and on acceptance of the plea of guilty under Rule 11, is there any authority that that can be attacked collaterally?

A Yes. There are several Court of Appeals cases.

The question we say that can be raised on collateral attack is the question of wehther, in fact, the defendant understood the nature of the charge at the time of the plea, not what transpired on the record between the Judge and the defendant. It is the question of actual understanding.

Q Let's leave that confusion where it is and let's go to the next phase.

All right, that is what happens before the Judge, or should happen under Rule 11 before the Judge, accepts a plea of guilty under Rule 11, and those were the events, imperfect or whatever they may have been, which occurred here on July 15, 1966; right?

A Yes.

Q Then you come to the next phase, which is the sentencing. That is the time at which the last sentence of Rule 11 applies, is it not?

A Yes.

Q And that was September 1966. Rule 11, as amended, effective July 1, states that the Court shall not enter a judgment upon the plea of guilty unless it is satisfied that there is a factual basis for the plea.

Do you want to tell this Court, or do you want to make any comment to this Court, as to whether that sentence was satisfied in this case, remembering it does not have to be satisfied on July 15 if what I have said is correct, but it does have to be satisfied by the time the judgment is entered, which in this case was September?

In the colloquy in September, according to this record, the Judge did refer to what he referred to as more or less deliberately confused bookkeeping of the defendant as disclosed by the presentence report; is that right?

A Yes.

Q So that there is some indication here that the Judge did have before him some information going to what actually happened here, going to the factual basis for the plea; is that right?

A Yes.

Q Is it the Government's position that that is essential, that it is essential to comply with that last sentence, that there be some indication of some sort on the record that the Court did look into and was satisfied that there was a factual basis for the plea, or do you say that that last sentence doesn't mean anything of the sort?

A I think there should be some indication in the record. I think it was sufficiant here without even some of the colloquy.

Q You think there should be some indication, but that the indication here is enough?

A The crucial point being it was indicated that the Judge considered a presentence report.

Q And you say that the Court doesn't have to enter anything on the record to the effect that it is satisfied that there was a factual basis for the plea?

A No. We would suggest that is sufficiently implicit in the entry of judgment.

Q There was nothing on the record in this case to that effect.

A No. The Judge did not say, "I am satisfied." However, we would suggest that the language in the last sentence of Rule 11 was chosen advisedly. It contemplates an informal determination by the use of the word "satisfied" and that requirement was fulfilled here.

Q Is the presentence report made available to the defendant and his counsel?

A Under a contemporaneous amendment to Rule 32a, the Trial Judge is told that he may make the presentence report available. It was not requested.

Q In this case?

A No. Here it was not made available to the defendant and not requested.

Q How do you know from what the Judge said that he actually got that, even from the presentence report which was not available to the defendant? Might he have gotten it from discussion with the District Attorney or with somebody else?

A That certainly is not concluded.

Q It certainly doesn't show that he got it in any legal way, does it, what he said?

A No. We would suggest, however, that it should not be required to satisfy the last sentence of Rule 11 that the record support with appropriate evidence the determination of "satisfy" that the Trial Judge makes.

Q What is there in this record to support the

statement that the Judge is satisfied with the fact that he didn't properly keep his books, but kept them intentionally wrong? What is there in the record that we can review to support that conviction on the part of the Judge?

A There is very little, we have to admit.

Q There is nothing; isn't that correct?

A There is nothing in the ordinary sense of evidence; yes.

Q All right.

Mr. McCarthy?

REBUTTAL ORAL ARGUMENT OF MAURICE J. McCARTHY, ESQ.

ON BEHALF OF THE PETITIONER

MR. McCARTHY: If I may make two brief points, Your Honor, counsel for the respondent has brought up one thing which we argued in our brief and which counsel for respondent has never answered.

He said that an accord of sorts was reached, that Government counsel indicated to the Judge when he appeared ex parte, because of the defendant's illness, that the matter would not go to trial, according to counsel for the defendant. Later on, the District Court was informed that there was an understanding that the tax and penalties would be paid.

If this is true, and we have argued if this is true, is this not another urgency for inquiry, that a man who has, to the knowledge of the District Court, been hospitalized for

alcoholism, who could not stand trial two weeks before he entered his plea of guilty because of illness -- is it not significant that the Government now argues that there might have been some accord?

I think that this is another point indicating that there was a need for the District Court to inquire into this matter, and that this should not have been left unnoticed.

Lastly, I would like to point out that the finding which the Court has made in this case, at page 8 of the appendix, is not that there is any determination on the defendant's understanding. The finding that the Court makes is that the defendant was advised of the consequences.

There clearly in the record is no finding at all that there was any informing of the defendant as to the nature of the charge. There is nothing in the record to indicate whether or not the defendant actually did understand the charge, and the statements in the record which give some evidence on this matter are inconsistent with an understanding of a plea of guilty to a charge of a crime which requires the specific intent for its fruition.

I think in the allocution that the very first matter that came to the Judge in the allocution was the defendant's statement "If it were not for my health and the things I have gone through, it never would have happened, and it was not deliberate and I am sorry."

That is almost verbatim what he said. I think when you have a specific intent crime, a statement such as "It is not eeliberate," a vague and amorphous statement of that nature requires inquiry.

If it is what counsel for respondent calls an act of attrition, it certainly is not an admission of guilt. At no point in this record is there an admission ofguilt, an admission of understanding, an admission that the mental state necessary to the crime was ever present.

Now counsel wants us to go back to the District Court and to go through one of the procedures which he suggests, one of which would require that the defendant be in custody; the other procedure requiring that the defendant bear the burden of proving his innocence.

We feel that the constitutional issue in this has never been answered and that counsel has made no attempt to answer it.

Q I notice in the last sentence of your brief you ask that the case be reversed and, accordingly, remanded for further proceedings in conformity with law. What proceedings?

A A trial on the merits, Your Honor.

Q A trial on the merits?

A Yes.

Q That is what you mean by further proceedings?

A Yes.

Q Do you mean you foreclose the possibility of

another plea of guilty? He may not, but I take it if he wanted to, you don't foreclose that possibility, do you?

A I certainly don't foreclose the possibility of entering a guilty plea. That is a bridge I have not come to yet. But it seems to me that with the evidence in the record, a plea of guilty would not be made.

Q But you do not ask for anything more than to give the man a trial?

A Yes, Your Honor; that is right.

(Whereupon, at 11:30 a.m. the oral argument in the above-entitled matter was concluded.)